

No. 13-20-00288-CR

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IN THE COURT OF APPEALS  
FILED IN  
13th COURT OF APPEALS  
CORPUS CHRISTI/EDINBURG, TEXAS  
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FOR THE STATE OF TEXAS KATHY S. MILLS  
Clerk

THIRTEENTH JUDICIAL DISTRICT

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*Ex parte*  
*Krisean Jamon Gibson (K.G.)*

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On Appeal from the 19th District Court  
Of McLennan County, Texas  
Trial Court No. 2020-555-C1B

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BRIEF FOR APPELLANT  
ORAL ARGUMENT REQUESTED

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## STATEMENT OF THE CASE

This is an appeal from a pretrial writ of habeas corpus seeking personal bond (CR 5).<sup>1</sup> Gibson was arrested for murder<sup>2</sup> on February 21, 2020 (2 RR 9). Both Gibson's application and hearing were filed and held in the middle of the COVID-19 pandemic on June 12, 2020 (2 RR 1). This case, and Gibson's other case involve similar appellate issues, but otherwise are regarding unrelated allegations (CR 21).

Gibson also has a pending felony motion to revoke probation (CR 26). He has been incarcerated while resolution of all three matters (*id.*).

The trial court denied relief and entered findings of fact and conclusions of law (2 RR 15; CR 33-37).

Gibson timely filed his notice of appeal (CR 43).

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<sup>1</sup> This case overlaps with Case No. 13-20-00287-CR in that it is another application for writ of habeas corpus seeking personal bond for a separate, unrelated aggravated assault case was heard by the trial court in the same proceeding. *See* TEX. PENAL CODE § 22.02(a)(2). The trial court's findings of fact and conclusions of law joined both cases into one set (CR 31).

<sup>2</sup> *See* TEX. PENAL CODE § 19.02.

## REQUEST FOR ORAL ARGUMENT

Oral Argument before this Court is requested.

## ISSUES PRESENTED

- I. Whether Supreme Court's Twelfth Emergency Order is unconstitutional.
- II. Whether for purposes of Texas Code of Criminal Procedure 17.151 the State can be ready on a void indictment.
- III. Whether the trial court abused its discretion in denying Gibson a personal bond.

## STATEMENT OF FACTS

On May 22, 2020, Gibson filed two applications for writs of habeas corpus seeking personal bond under Texas Code of Criminal procedure 17.151 (CR 5-59). This appeal relates to the application on the murder case (CR 5). Gibson sought this relief as the criminal justice system, and rest of the world, came to a standstill due to the COVID-19 pandemic (CR 5-6).

The Supreme Court of Texas and the Court of Criminal Appeals issued a series of emergency orders regarding procedures and deadlines during the COVID-19 pandemic.<sup>3</sup> The courts did so after Governor Greg Abbott declared a state of disaster because of the pandemic.<sup>4</sup>

Gibson was indicted for murder on May 6, 2020 (CR 49). Four days following the filing of his application, on May 26, he was re-indicted for the same offense (CR 50).

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<sup>3</sup> Emergency Orders, “Current Emergency Orders Issue,” <https://www.txcourts.gov/court-coronavirus-information/emergency-orders/>

<sup>4</sup> Proclamation, “Governor Abbott Declares State of Disaster in Texas Due to COVID-19,” (Mar. 13, 2020), <https://gov.texas.gov/news/post/governor-abbott-declares-state-of-disaster-in-texas-due-to-covid-19>.

Gibson's application challenged the constitutionality of the Supreme Court's Twelfth Order (CR 28-31), which was the basis on which the trial court denied relief (2 RR 10, 15; CR 5-22). Specifically, Gibson argued that his confinement and restraint was illegal because he was indicted by an unlawfully constituted grand jury, that was organized pursuant to the Supreme Court's Twelfth Emergency Order ("Twelfth Emergency Order") (CR 5-6). Because his indictment was returned by an unlawfully constituted grand jury, Gibson argued his confinement and restraint is illegal because the State has failed to be ready for trial 90 days from the commencement of his detention and he is accused of a felony (2 RR 11, 15).

Specifically, the State failed to properly indict Mr. Gibson within 90 days from the date of his detention, which began on February 21, 2020. At the time of filing his application, Gibson was incarcerated 95 days. As evidence, Gibson pointed to the State's re-indictment of him with a properly convened grand jury. Following a hearing, on June 12, 2020, the trial court denied relief and agreed to making findings of fact and conclusions of law (2 RR 15; CR 33-37).

The State proposed findings of fact and conclusions of law were adopted in full by the trial court (CR 34-37).<sup>5</sup>

As it relates to this case, the trial court found as follows:

1. Gibson was arrested on February 21, 2020.
2. His detention began on that date.
3. On May 6, 2020, Gibson was indicted by the grand jury of McLennan County for the offense of murder in cause number 2020-555-C1.
4. On May 26, 2020, Gibson was reindicted by the grand jury of McLennan county for the offense of murder in the same cause.
5. As of the date of the hearing, June 12, 2020, approximate 114 days has elapsed from the date that Gibson was initially detained on the allegation of murder indicting in cause number 2020-555-C1.
6. Gibson is detained on offenses that all involve [allegations of] physical violence.
7. During the hearing on Gibson's Application, the State announced

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<sup>5</sup> The findings of fact and conclusions of law were submitted in conjunction with findings on related 13-00287-CR (2020-555-C1A).

that it had been ready at the time of the return of the indictment on May 6, 2020.

8. Gibson failed to present sufficient evidence to rebut the State's retrospective announcement of readiness.
9. The Court finds that the State was ready on May 6, 2020.
10. Six out of twelve grand jurors at the meeting on May 6, 2020 appeared through videoconferencing.
11. This Court authorized grand jurors to appear through video conferencing at the meeting on May 6, 2020.
12. The Texas Supreme Court authorized trial courts to allow grand jurors to appear remotely in their Twelfth Emergency Order issued on April 27, 2020.
13. The State's reliance on this Court's authorization for the remote appearance of grand jurors and the Twelfth Emergency Order was reasonable.
14. There is no evidence of bad faith on part of the State.
15. Pursuant to *Ex parte Brosky*, 863 S.W.3d 775 (Tex. App. — Ft.

- Worth 1993); *Behrend v. State*, 729 S.W.2d 717 (Tex. Crim. App. 1987) and *Ward v. State*, 659 S.W.2d 643 (Tex. Crim. App. 1983), the State was “ready” as contemplated under 17.151 on May 6, 2020, regardless of the validity of the indictment returned.
16. The appearance of the grand jurors remotely did not violate the Constitution of the United States or of the State of Texas.
  17. The Twelfth Emergency Order by the Texas Supreme Court does not violate the Constitution of the United States or of the State of Texas.
  18. The indictment returned by the Grand Jury on May 6, 2020, was returned by a quorum of a lawfully impaneled Grand Jury and is therefore valid.
  19. Gibson’s detention on the Motion to Revoke Probation for aggravated robbery in cause number 2017-954-C1 constitutes “another allegation” pursuant to Article 17.151.
  20. Gibson has not filed a motion pursuant to Article 42A.751(d) of the Texas Code of Criminal Procedure requesting a hearing on the

Motion to Revoke.

21. The 20 day deadline under Article 42A.751(d) does not begin until Gibson files a motion for a hearing.
22. Gibson is currently detained on “another allegation” in which the deadline under 17.151 has not expired under cause number 2017-954-C1. *See Ex parte De Paz*, 03-15-00581-CR, 2016 WL 3765751 (Tex. App. – Austin July 7, 2016, no pet.)
23. Gibson is not entitled to a personal bond pursuant to Article 17.151.

(CR 33-37)

The trial court certified Gibson’s right to appeal (CR 42).

## SUMMARY OF THE ARGUMENT

Gibson is unlawfully restrained in his liberty because the State was not ready for trial within 90 days from the date of his detention (CR 5). The trial court abused its discretion in denying Gibson the personal bond to which he was entitled. The Supreme Court of Texas and the Court of Criminal Appeals issued a series of emergency orders regarding procedures and deadlines during the COVID-19 pandemic.<sup>6</sup> The courts did so after Governor Greg Abbott declared a state of disaster because of the pandemic.<sup>7</sup>

Gibson was indicted by an unlawfully constituted grand jury, that was organized pursuant to the Supreme Court's Twelfth Emergency Order Regarding the COVID-19 State of Disaster, which Gibson contends is unconstitutional. Because his indictment was returned by an unlawfully constituted grand jury, it is void. *Brannan v. State*, 219 S.W. 1096, 1096 (Tex.

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<sup>6</sup> Emergency Orders, "Current Emergency Orders Issue," <https://www.txcourts.gov/court-coronavirus-information/emergency-orders/>

<sup>7</sup> Proclamation, "Governor Abbott Declares State of Disaster in Texas Due to COVID-19," (Mar. 13, 2020), <https://gov.texas.gov/news/post/governor-abbott-declares-state-of-disaster-in-texas-due-to-covid-19>.

Crim. App. 1920). The State cannot announce ready on a void indictment. Therefore, under Texas Code of Criminal Procedure Article 17.151, Mr. Gibson's confinement and restraint is illegal because the State has failed to be ready for trial 90 days from the commencement of Gibson's detention and he is accused of a felony. Here, the trial court relied on the Supreme Court's Twelfth Emergency Order as its basis for denying Gibson relief (CR 33-37).

The Twelfth Order is unconstitutional. First, it is unconstitutional insofar as it purports to allow grand jurors to deliberate other than in person. Second, it unconstitutionally dispenses with a grand jury quorum. Third, it unconstitutionally dispenses with the in-person grand jury requirement. Fourth, it unconstitutionally permits unauthorized persons in the grand jury room. Fifth, it unconstitutionally suspends statutory requirements.

Because the Order is unconstitutional, the convening of the grand jury was unlawful and unconstitutional. Since the grand jury was not convened lawfully, the indictment is void. Consequently, because the State

cannot be ready for trial on a void indictment, Gibson's unlawful restraint has no justification. For these reasons, the trial court abused its discretion in denying Gibson a personal bond.

## ARGUMENT & AUTHORITIES

In an April 2020 Memorandum, the United States Attorney General William Barr declared, “[T]he Constitution is not suspended in times of crisis.”<sup>8</sup> Days later, the Supreme Court echoed this sentiment:

. . . when constitutional rights are at stake, courts cannot automatically defer to the judgments of other branches of government. . . [and] [w]hen properly called upon, the judicial branch must not shrink from its duty to require . . . orders to comply with the Constitution and the law, no matter the circumstances.

*See In re Salon a La Mode*, 2020 WL 2125844 at \*1 (Tex. May 5, 2020).

“The Constitution is not suspended when the government declares a state of disaster. Nor do constitutional limitations on the jurisdiction of courts cease to exist.” *In re Abbott*, No. 20-0291, 2020 WL 1943226, at \*1 (Tex. Apr. 23, 2020) (per curiam).

### *Preservation of Error*

A defendant may use a pretrial application for writ of habeas corpus to challenge the denial of bail. *Ex parte Smith*, 178 S.W.3d 797, 801 (Tex.

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<sup>8</sup> Memorandum, “Balancing Public Safety with Preservation of Civil Rights,” (April 27, 2020), <https://www.justice.gov/opa/page/file/1271456/download>

Crim. App. 2005). The trial court made findings of fact and conclusions of law and entered an order denying relief (CR 66-70).

For this reason, this Court has jurisdiction to hear this appeal and error is preserved for this Court's review. *Ex parte Young*, 257 S.W.3d 276, 277 (Tex. App. – Beaumont 2008, no pet.) (“No appeal lies from the refusal to issue a writ of habeas corpus unless the trial court rules on the merits of the application.”).

#### *Overview of Twelfth Emergency Order & Why It Does Not Apply to Grand Juries*

The Twelfth Emergency Order does not apply to grand juries. Pursuant to the Twelfth Emergency Order, this Court and the district clerk allowed grand jurors to participate virtually via videoconferencing. But grand jury meetings are not “court proceedings” within the meaning of Government Code section 22.0035(b), and so the Twelfth Emergency Order does not apply or authorize virtual participation by grand jurors.

The Supreme Court's authority to enter the Twelfth Emergency Order flows from section 22.0035(b), which authorizes the Supreme Court to

modify or suspend procedures for “any *court proceeding* affected by a disaster.” TEX. GOV’T CODE § 22.0035(b) (emphasis added).

The convening of a grand jury is not a “court proceeding.” Therefore, the Twelfth Emergency Order cannot apply to grand juries. To the extent it purports to do so, or is interpreted as doing so, the Twelfth Emergency Order exceeds the Supreme Court’s statutory grant of authority.

A grand jury is not a “court proceeding.” *United States v. Mandujano*, 425 U.S. 564, 573 (1976). A grand jury’s actions pre-date the commencement of court proceedings, and no judge presides to monitor the grand jury. *United States v. Calandra*, 414 U.S. 338, 343 (1974). A grand jury requires no authorization from its constituting court to initiate investigation, nor does a prosecutor require leave of court to seek a grand jury indictment. *United States v. Williams*, 504 U.S. 36, 48 (1992). “The grand jury belongs to no branch of government, but rather serves ‘as a kind of buffer or referee between the Government and the people.’” *Gunville v. Gonzales* 508 S.W.3d 547, 563 (Tex. App. — El Paso 2016, no pet.) (quoting *Williams*, 504 U.S. at 47).<sup>9</sup> In its day-

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<sup>9</sup> *But see Borque v. State*, 156 S.W.3d 675, 678 (Tex. App. — Dallas, 2005, pet. ref’d) (grand jury often characterized as an arm of the court).

to-day functioning, the grand jury operates independently of the court. *Gunville*, 508 S.W.3d at 563 (citing *United States v. Dionisio*, 410 U.S. 1, 16–17 (1973); *Stirone v. United States*, 361 U.S. 212, 218 (1960)).

A grand jury’s deliberations concerning any inquiry into presentment of an indictment are secret, giving it a separate and independent existence from the Court that impaneled it. 2 D. MARK ELLISTON & TERRENCE W. KIRK, TEX. PRACTICE GUIDE: CRIMINAL PRACTICE & PROCEDURE § 17:7. Texas courts have long declined to inquire into the conduct of matters within the grand jury room or “go behind” an otherwise valid indictment. *See Morrison v. State*, 41 Tex. 516, 518-19 (1874); *DeBlanc v. State*, 799 S.W.2d 701, 706 (Tex. Crim. App. 1990); *Barnes v. State*, 116 S.W.2d 408, 409 (Tex. Crim. App. 1938).

Because grand jury sessions are not “court proceedings,” the Twelfth Emergency Order does not apply to such sessions. Therefore, this Order has no effect on the long-established legal authorities requiring grand jurors to convene in-person to deliberate or present indictments. Because the purported grand jury in Applicant’s case did not convene in person with a quorum of 9, the document it issued purporting to be an indictment does not

constitute an indictment and is void. *Vance v. State*, 30 S.W. 792, 793 (Tex. Crim. App. 1895) (indictment presented by 11 grand jurors failed to vest court with jurisdiction and dismissal required); *Ralls v. State*, 205 S.W.2d 594, 598 (Tex. Crim. App. 1947) (indictment presented by 13 grand jurors “would be void”); *see also Cook v. State*, 902 S.W.2d 471, 480 (Tex. Crim. App. 1995).

However, even if the Order did apply, it is unconstitutional. The next section discusses the ways in which it is so.

**I. The Supreme Court’s Twelfth Emergency Order is unconstitutional.**

The Order is unconstitutional. First, it is unconstitutional insofar as it purports to allow grand jurors to deliberate other than in person. Second, it unconstitutionally dispenses with a grand jury quorum. Third, it unconstitutionally dispenses with the in-person grand jury requirement. Fourth, it unconstitutionally permits unauthorized persons in the grand jury room. Fifth, and finally, it unconstitutionally suspends statutory requirements.

A. *The Order is unconstitutional insofar as it purports to allow grand jurors to deliberate other than in person.*

Under the Texas Constitution, no person may be brought to court to answer a felony charge without a grand jury indictment. TEX. CONST. art. 1, § 10.

Article V, section 13 of the Texas Constitution establishes the requirements for a grand jury and a grand jury quorum.

“Grand and petit juries in the district courts shall be composed of twelve persons, except that petit juries in a criminal case below the grade of felony shall be composed of six persons; but nine members of a grand jury shall be a quorum to transact business and present bills.”

TEX. CONST. art. V, § 13.

The Supreme Court purported to issue its Twelfth Emergency Order pursuant to section 22.0035(b) of the Government Code which provides:

Notwithstanding any other statute, the supreme court may modify or suspend procedures for the conduct of any court proceeding affected by a disaster during the pendency of a disaster declared by the governor. An order under this section may not extend for more than 90 days from the date the order was signed unless renewed by the chief justice of the supreme court.

TEX. GOV'T CODE § 22.0035(b).

Applicant's attack focuses on Part 3(b) of the Twelfth Emergency

Order which states:

**Subject only to constitutional limitations**, all courts in Texas may in any case, civil or criminal—and must to avoid risk to court staff, parties, attorneys, jurors, and the public— without a participant's consent:

b. Allow or require anyone involved in any hearing, deposition, or other proceeding of any kind—including but not limited to a party, attorney, witness, court reporter, **or grand juror**, but not including a petit juror—to participate remotely, such as by teleconferencing, videoconferencing, or other means.

Twelfth Emergency Order at 1-2 (emphases added); CR 29-31.

The Twelfth Emergency Order is unconstitutional insofar as it purports: (1) to suspend the constitutional requirements of a grand jury quorum to return indictments; (2) to suspend the common law requirement of grand juror-in person attendance; or (3) to allow unauthorized persons into grand jury deliberations. As discussed in Section B, the Twelfth Emergency Order also violates the separation of powers provisions of article II, section 1 of the Texas Constitution by purporting to allow the Supreme Court to exercise legislative functions. *See* TEX. CONST. art. II, § 1.<sup>10</sup>

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<sup>10</sup> Article 2, section 1 provides:

1. *The Order unconstitutionally dispenses with a grand jury quorum.*

Pursuant to the Twelfth Emergency Order, this Court and the district clerk allowed a grand jury to purportedly convene on May 6, 2020 with grand jurors having the option to virtually appear online via ZOOM (or other internet-based videoconferencing means) instead of appearing in person. As a result, 6 grand jurors appeared in person, and 6 appeared virtually. The latter 6 were not physically present in the room where grand jury deliberations occurred. This convening violated Applicant's right to due course of law and violated the grand-jury quorum requirement of the Texas Constitution.

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The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.

TEX. CONST. art. II, § 1.

Article V, section 13 of the Texas Constitution requires a quorum of at least 9 grand jurors for deliberation and presentment of indictments. TEX. CONST. art. V, § 13.

An indictment presented by other than a quorum is a nullity and confers no jurisdiction on the trial court. *See Lott v. State*, 18 Tex. Ct. App. 627, 629-30 (1885), *overruled on other grounds by King v. State*, 473 S.W.2d 43 (Tex. Crim. App. 1971) (allowing waiver of indictment). Such an assemblage also denies an accused person of due course of law under the Texas Constitution. *Lott*, 18 Tex. Ct. App. at 630; *see* TEX. CONST. art. I, § 19.11

Because the purported indictment was returned by less than a quorum, the indictment is void. *See Brannan v. State*, 219 S.W. at 1096 (where purported indictment presented by grand jury that convened with unauthorized “substitute” grand jurors, prosecution dismissed because act of illegal grand jury was void) (citing *Wright v. State*, 217 S.W. 152, 152-53 (Tex. Crim. App. 1919)).

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<sup>11</sup> “No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.” TEX. CONST. art. I, § 19.

A constitutional grand jury is composed of 12 members. *Lott*, 18 Tex. Ct. App. at 629.

There is no authority of law for a grand jury composed of any other number of men than twelve. Thirteen men do not and cannot constitute a grand jury. If thirteen could be considered a grand jury, so could one, five, fifty, or any other number that the fancy of the judge organizing the same might dictate.

*Id.* Obviously, a grand jury of 6 violates this constitutional requirement.

If the same is true for the number of grand jurors selected to serve, the same must be true for a constitutional quorum of grand jurors.

The word “quorum” is not defined in the Constitution. As such, the language used must be presumed to have been carefully selected, and the words used are to be interpreted as the people generally understood them at the time of passage.<sup>12</sup> Accordingly, when interpreting the state constitution, reviewing courts rely heavily on its literal text and give effect to its plain language. *Garofolo v. Ocwen Loan Servicing, L.L.C.*, 497 S.W.3d 474,

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<sup>12</sup> *Cramer v. Sheppard*, 167 S.W.2d 147, 152 (Tex. 1942). Courts do not construe words used in the Constitution so as to give them a meaning more narrow than one which they had in the common parlance of the times in which the Constitution was written. *United States v. S.-E. Underwriters Ass'n*, 322 U.S. 533, 539 (1944).

477 (Tex. 2016). When considering the literal text, courts are to read the applicable constitutional provisions in context and construe it according to the rules of grammar and common usage. *Johnson v. Tenth Jud. Dist. Ct. App.*, 280 S.W.3d 866, 872 (Tex. Crim. App. 2008).

The constitutional requirement of a quorum has been enshrined in the Texas Constitution since 1876. In 1828, the term was defined as a “bench of justices, or such a number of officers or members as is competent by law or constitution to transact business; as a quorum of the house of representatives.”<sup>13</sup> The current edition of Black’s Law Dictionary defines quorum as “the smallest number of people who must be present at a meeting so that official decisions can be made; specifically, the minimum number of members who must be present for a deliberative assembly to legally transact business.”<sup>14</sup>

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<sup>13</sup> WEBSTER’S DICTIONARY (1828), available at <https://tinyurl.com/ya2n7xrr> (last accessed May 16, 2020).

<sup>14</sup> BLACK’S LAW DICTIONARY (11th ed. 2019).

The term “present” requires one to be “in attendance”<sup>15</sup>; “not elsewhere,” *i.e.* “all present voted for him.” Distilled down, a physical – not virtual – presence is required for a quorum of a grand jury. Quite clearly, attending *virtually* through videoconferencing means a grand juror is physically elsewhere, not physically present.

The 6-person grand jury that purported to present an indictment against Applicant did so without a constitutionally-required quorum. Because there was no lawful grand jury convened to deliberate and present indictments, the document purporting to be an indictment against Applicant is void. *See Vance v. State*, 30 S.W. at 793; *Ralls v. State*, 205 S.W.2d at 598; *see also Cook v. State*, 902 S.W.2d at 480.

The Supreme Court cannot suspend constitutional requirements. *See Abbott*, 2020 WL 1943226, at \*1. But the Supreme Court has done so with its Twelfth Emergency Order to the extent the Order purports to authorize grand jurors not to be physically present for deliberations. This violates the

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<sup>15</sup> WEBSTER’S DICTIONARY (1828), available at <https://tinyurl.com/ya2n7xrr> (last accessed May 16, 2020).

grand-jury quorum requirement of article V, section 13 and the Due Course of Law provisions of the Texas Constitution. *See Vance*, 30 S.W. at 793; *Ralls*, 205 S.W.2d at 598; *Brannan*, 219 S.W. at 1096; *Wright*, 217 S.W. at 152-53; *Lott*, 18 Tex. Ct. App. at 629-30; *see also Cook*, 902 S.W.2d at 480.

Accordingly, the document purporting to be an indictment against Applicant is void.

2. *The Order unconstitutionally dispenses with the in-person grand jury requirement.*

Pursuant to the Twelfth Emergency Order, this Court and the district clerk allowed a grand jury to convene and deliberate without a quorum being present in person. This violated Applicant's right to due course of law and the grand-jury quorum requirement of the Texas Constitution.

An accused person has a constitutional right to due course of law. TEX. CONST. art. I, § 19. Due course of law contemplates, among other things, compliance with the constitutional and statutory requirements for the formation and convening of grand juries. *See Lott*, 18 Tex. Ct. App. at 629-30.

The Constitution requires a grand jury comprised of 12 persons acting with a quorum of no less than 9. TEX. CONST. art. V, § 13. The Code of

Criminal Procedure contains several provisions designed to effectuate the constitutional requirement of a 12-person grand jury that convenes together in a single place, deliberates and presents indictments.

Article 20.01 requires the sheriff to prepare “a suitable place” (*i.e.*, a “grand jury room”) for the grand jury to meet. TEX. CODE CRIM. PROC. art. 20.01; *see* TEX. CODE CRIM. PROC. art. 20.011 (describing requisites for “grand jury room”).

A quorum of at least 9 grand jurors “must be present” to present an indictment. TEX. CODE CRIM. PROC. art. 20.21.

These provisions operate to effectuate the constitutional and common-law requirement that a quorum of grand jurors must assemble **in person** to deliberate and present indictments. Applicant incorporates by reference the discussion above regarding what the Texas Constitution means when it provides for a grand jury quorum. The constitution contemplates a quorum of grand jurors meeting together in person.

The 6-person grand jury that purported to present an indictment against Applicant did so without a constitutionally required in-person

quorum of 9. Because there was no lawful grand jury convened to deliberate and present indictments, the document purporting to be an indictment against Applicant is void. *See Vance*, 30 S.W. at 793; *Ralls*, 205 S.W.2d at 598; *see also Cook*, 902 S.W.2d at 480.

The Supreme Court cannot suspend constitutional requirements. *See Abbott*, 2020 WL 1943226, at \*1. But the Supreme Court has done so with its Twelfth Emergency Order to the extent the Order purports to authorize grand jurors not to be physically present for deliberations. This violates the in-person requirement of article V, section 13 and the Due Course of Law provisions of the Texas Constitution. *See Vance*, 30 S.W. at 793; *Ralls*, 205 S.W.2d at 598; *Brannan*, 219 S.W. at 1096; *Wright*, 217 S.W. at 152-53; *Lott*, 18 Tex. Ct. App. at 629-30; *see also Cook*, 902 S.W.2d at 480.

Accordingly, the document purporting to be an indictment against Gibson is void.

3. *The Order unconstitutionally permits unauthorized persons in the grand jury room.*

Pursuant to the Twelfth Emergency Order, this Court and the district clerk allowed grand jurors to participate virtually via videoconferencing. This violated Applicant's right to due course of law.

The Constitution requires a grand jury comprised of 12 persons acting with a quorum of no less than 9. TEX. CONST. art. V, § 13. The Code of Criminal Procedure contains several provisions designed to effectuate the constitutional requirement of a 12-person grand jury that convenes together in a single place, deliberates and presents indictments.

Applicant incorporates by reference the discussion above about the relevant statutes governing the grand jury. The following statutes address unauthorized persons.

Article 20.011(b) expressly prohibits the presence in the "grand jury room" of anyone other than grand jurors during deliberations. *Id.* art. 20.011(b). This is consistent with a long line of authorities that show that an indictment must be set aside if an unauthorized person was present during deliberations. *See Ray v. State*, 561 S.W.2d 480, 481 (Tex. Crim. App. 1977);

*Brannan*, 219 S.W. at 1096; *Wright*, 217 S.W. at 152-53; *Rothschild v. State*, 7 Tex. Ct. App. 519, 538-39 (1880); see also TEX. CODE CRIM. PROC. art. 27.03(2) (indictment may be set aside if unauthorized person present during deliberations).

Grand jury sessions are secret. See TEX. CODE CRIM. PROC. art. 20.02. Criminal penalties are provided for anyone who discloses “*anything* transpiring before the grand jury.” *Id.* (emphasis added). Texas courts have long declined to inquire into the conduct of matters within the grand jury room or “go behind” an otherwise valid indictment. See *Morrison v. State*, 41 Tex. 516, 518-19 (1874); *DeBlanc*, 799 S.W.2d at 706; *Barnes*, 116 S.W.2d at 409.

Recognizing the sanctity and secrecy of the grand jury, the Texas Legislature carefully drafted a narrow statute that allows a peace officer to appear before a grand jury virtually instead of in person. See TEX. CODE CRIM. PROC. art. 20.151. Article 20.151 provides numerous safeguards to preserve the sanctity and security of the grand jury.

- the foreman and prosecuting attorney must consent
- the videoconferencing system used must be encrypted

- no person other than an authorized person in the grand jury room may hear the testimony
- the testimony may not be recorded or otherwise preserved by anyone at the location where the witness is located

*Id.*

Even if the Supreme Court could authorize grand jurors to participate virtually for deliberations (which Gibson in no way does not concede), such authorization does not comply with due course of law unless it includes security measures similar to those contained in article 20.151. Such a requirement is critical to preserve the sanctity and secrecy of the grand jury.

The open-ended authorization for grand jurors to participate via videoconferencing gives rise to at least two different threats to the secrecy of the grand jury. First, a danger exists that unauthorized persons in the home (or other location) of a grand juror participating virtually will watch, participate in, or otherwise “attend” the grand jury’s assemblage and deliberations. And second, without an encryption requirement or other security features, virtual participation by a grand juror with home (or office)

computer equipment presents a genuine risk of security breaches by unauthorized third persons.

Accordingly, the Twelfth Emergency Order violates Applicant's right to due course of law to the extent that it fails to include security measures consistent with those in article 20.151.

The Supreme Court cannot suspend constitutional requirements. *See Abbott*, 2020 WL 1943226, at \*1. But the Supreme Court has done so with its Twelfth Emergency Order to the extent the Order purports to authorize grand jurors to virtually participate as grand jurors without adequate security measures. This violates the Due Course of Law provisions of the Texas Constitution. *See Vance*, 30 S.W. at 793; *Ralls*, 205 S.W.2d at 598; *Brannan*, 219 S.W. at 1096; *Wright*, 217 S.W. at 152-53; *Lott*, 18 Tex. Ct. App. at 629-30; *see also Cook*, 902 S.W.2d at 480.

Accordingly, the document purporting to be an indictment against Applicant is void.

B. *The Order unconstitutionally suspends statutory requirements.*

The Twelfth Emergency Order also violates the separation of powers provisions of article II, section 1 of the Texas Constitution by purporting to allow the Supreme Court to exercise legislative functions. *See* TEX. CONST. art. II, § 1.<sup>16</sup>

Only the Legislative Branch can suspend laws. TEX. CONST. art. I, § 28. (“No power of suspending laws in this State shall be exercised except by the Legislature.”). The State Constitutions of 1845, 1861, 1866, and 1869 permitted delegation of suspension authority. *McDonald v. Denton*, 63 Tex. Civ. App. 421, 426 (1910). The 1867 amendment, however repealed that authority. To this day, only the Legislature itself has the power to suspend laws.

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16 Article 2, section 1 provides:

The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.

TEX. CONST. art. II, § 1.

Pursuant to the Twelfth Emergency Order, this Court and the district clerk allowed grand jurors to participate virtually via videoconferencing. But article I, section 28 of the Texas Constitution permits only the Legislature to suspend statutory requirements. The Twelfth Emergency Order violates this constitutional provision to the extent the Order purports to suspend statutory requirements.

“No power of suspending laws in this State shall be exercised except by the Legislature.” TEX. CONST. art. 1, § 28.

Applicant incorporates by reference the discussion above about the various statutes governing grand juries. Notably, article 20.21 requires that a quorum of at least 9 grand jurors “must be present” to deliberate and present an indictment. TEX. CODE CRIM. PROC. art. 20.21.

Under article I, section 28 of the Texas Constitution, no entity but the Legislature has authority to suspend this statutory requirement (or any of the other statutes governing grand juries). *See State v. Ferguson*, 125 S.W.2d 272, 276 (Tex. 1939); *Snodgrass v. State*, 150 S.W. 178, 180-81 (Tex. Crim. App. 1912).

It is noteworthy that the Texas Constitution of 1869 provided, “No law should be suspended, except by the Legislature, *or its authority.*” TEX. CONST. OF 1869, art. I, § 20 (emphasis added). Thus, the 1869 Constitution authorized delegation of the power to suspend legislation. However,

Immediately upon the installation of Governor Coke, an amendment to the Constitution was submitted in which this section was amended so as to omit from its reading the expression “or its authority.” Since the adoption of that amendment, *the Constitution has limited the authority to suspend laws exclusively in the legislative department.*

*Snodgrass*, 150 S.W. at 180-81 (emphasis added).

Even if grand jury sessions are “court proceedings,” as the Supreme Court and this Court have apparently construed them to be, the Twelfth Emergency Order violates article I, section 28 because only the Legislature has the constitutional authority to suspend statutory requirements, and that authority cannot be delegated to another branch.

The Twelfth Emergency Order is unconstitutional insofar as it purports to suspend any statutory requirement governing grand juries. Because the purported grand jury in Applicant’s case did not convene in person with a quorum of 9 as required by statute, the document it issued

purporting to be an indictment does not constitute an indictment and is void. *See Vance*, 30 S.W. at 793; *Ralls*, 205 S.W.2d at 598; *see also Cook*, 902 S.W.2d at 480.

Because the power to suspend laws resides exclusively with the Legislature and cannot be delegated, the Order violates Article I, Section 28 of the Texas Constitution, and consequently is null and void.

**II. For purposes of Texas Code of Criminal Procedure 17.151, the State cannot be ready for trial on a void indictment.**

There is no case Gibson could find that discusses State's readiness for purposes of Texas Code Criminal Procedure 17.151. However, the State had the trial court rely on *Ex parte Brosky*, 863 S.W.3d 775 (Tex. App. – Ft. Worth 1993); *Behrend v. State*, 729 S.W.2d 717 (Tex. Crim. App. 1987) and *Ward v. State*, 659 S.W.2d 643 (Tex. Crim. App. 1983), to support the proposition that the State was “ready” as contemplated under 17.151 on May 6, 2020, regardless of the validity of the indictment returned. This is incorrect.

As Gibson told the trial court in argument, *Brosky* is a speedy trial case, not a 17.151 case (2 RR 15). The difference in relief between a 17.151

request and a speedy trial proceeding is crucial. The risk of dismissal for the State exists (although in theory more than practice) in a speedy trial situation if the state is not ready. That contrasts with the relief the State “risks” an accused being granted in the event of its delay in readiness, which is merely bond relief. For this reason, using *Brosky*, as the authority to support the contention that the State can be ready on a void indictment ignores, without recognizing the distinction, of the other case law previously discussed. *See Vance*, 30 S.W. at 793; *Ralls*, 205 S.W.2d at 598; *see also Cook*, 902 S.W.2d at 480.

For these reasons, as Gibson argued to the trial court, the State cannot be ready for purposes of Texas Code of Criminal Procedure 17.151 on a void indictment and he was entitled to the relief he requested.

**III. Because the Twelfth Emergency Order is unconstitutional, and because the State cannot be ready on a void indictment, the trial court abused its discretion in denying Gibson a personal bond the State was not ready for trial within 90 days.**

Article 17.151 requires reduction of bail if the State is not ready for trial.

Specifically, Article 17.151, section 1(1) of the Code of Criminal

Procedure provides in relevant part:

A defendant who is detained in jail pending trial of an accusation against him must be released either on personal bond or by reducing the amount of bail required, if the state is not ready for trial of the criminal action for which he is being detained within . . . 90 days from the commencement of his detention if he is accused of a felony.

TEX. CODE CRIM. PROC. art. 17.151, § 1(1).

The presentment of an indictment within that 90-day period creates the groundwork for an assertion of readiness. *Ex parte Avila*, 201 S.W.3d 824, 826 (Tex. App. – Waco 2006, no pet.) (without indictment, State cannot announce ready). Here, there was not a valid charging instrument until May 26, 2020. Gibson’s detention began on February 21. This was 95 days his detention, more than the 90 days permitted by statute. For the reasons discussed in Section II, the State was not ready because the first indictment was void because it was returned by an unlawfully convened grand jury of 6 in-person jurors and 6 virtual jurors contrary to both the constitution and relevant statutory provisions governing grand juries.

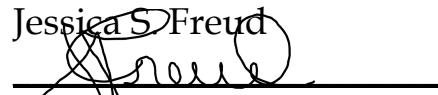
To the extent the trial court relied on the Twelfth Emergency Order to authorize the convening of the grand jury in any manner other than in person such action was unconstitutional because the Order is unconstitutional. For these reasons, the trial court abused its discretion in denying Gibson the personal bond.

**PRAYER**

WHEREFORE, PREMISES CONSIDERED, Gibson prays this Court reverse the order of the trial court and grant Gibson the personal bond to which he is entitled.

Respectfully submitted,

Jessica S Freud

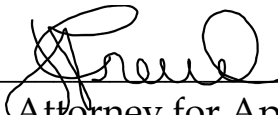


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Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Appellant's Brief was emailed to Sterling.Harmon@co.mclennan.tx.us and/or Gabe.Price@co.mclennan.tx.us of the District Attorney's Office of McLennan County, Texas, on November 16, 2020.

  
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Attorney for Appellant

IN THE COURT OF APPEALS  
THIRTEENTH JUDICIAL DISTRICT OF TEXAS  
CORPUS CHRISTI, TEXAS

*Ex parte*

*Krisean Gibson*

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No. 13-20-00288-CR

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9.4(i)(3), I hereby certify that the Appellant's Brief contains 6,818 words. The document was prepared using Microsoft Word, and the word count was generated using that program.

  
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